## BAN HONG JOO MINES LTD. v. CHEN & YAP LTD.

[F.C. (Ong Hock Thye C.J. (Malaya), Gill F.J. and Pawan Ahmad J.) March 29, 1969]

[Ipoh — Federal Court Civil Appeal No. X52 of 1968]

*Contract — Repudiation of — Earth excavation work — Provision for payment by instalments — Failure to pay instalments — Order to stop work — Breach of contract.*

The respondents had obtained judgment in the High Court against the appellants for the sum of $6,470 in respect of earth excavation work done by them for the appellants. The learned trial judge found that the appellants had committed a breach of the contract by their failure to pay instalments and by their order to the respondents to stop work.

**Held,** dismissing the appeal: (1) the deliberate refusal of the appellants to pay for what was already done by way of fortnightly payments and their order to the respondents to stop work left the respondents with no option but to treat the contract having been repudiated and to sue for payment for work which they had already done;

(2) in the circumstances the respondents are entitled to recover the amount either on the basis of work done by them at the appellant's request or by way of damages on the basis of *quantum meruit*.

*Cases referred to:—*

(1) *Simpson* v. *Crippin* (1872-73), 8 Q.B.D. 14.

(2) *Freeth* v. *Burr* (1873-74), 9 C.P. 208.

(3) *Mersey Steel & Iron Co. Ltd.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434; [1881-5] All E.R. Rep. 365.

(4) *Spettabile* v. *Northumberland Shipbuilding Co. Ltd.* [1918-19] All E.R. Reprint 963, 968.

(5) *James Shaffen Ltd.* v. *Findlay Durham & Brodie* [1953] 1 W.L.R. 106.

(6) *Sweet & Maxwell Ltd.* v. *Universal News Services Ltd.* [1964] 3 All E.R. 30.

FEDERAL COURT.

*P.P. Dharmanada* for the appellants.

*S.N. Leow* for the respondents.

**Gill F.J.** (delivering the reasons of the court dismissing the appeal): We dismissed this appeal from a judgment of the High Court against the defendants-appellants in the sum of $6,470 in respect of earth excavation work done for them by the plaintiffs-respondents under a written agreement between the parties in May, 1963, stating that we would give our reasons later. I do so now.

The preamble to and clause 1 of the agreement provided for the removal by the plaintiffs of earth to a depth of 25 feet from an area of approximately 9 acres of land situate at Timor to be pointed out by the defendants. They were to complete excavation work on an area of not less than 3 acres within a period of four months. The earth so excavated was to be removed to a place not more than 2,000 feet from the site pegged by the defendants (clause 3). Under clause 4 of the agreement the defendants were to pay to the plaintiffs a sum of fifty cents per cubic yard of earth so removed by the plaintiffs, seventy per cent of the amount due for the work done being payable once in every two weeks. The defendants were to pay a sum of $2,000 as an advance as soon as the plaintiffs conveyed an excavator to the site. Such advance was to be deducted from the amount due by the defendants to the plaintiffs on completion of the work. In the event of non-compliance by the plaintiffs with the terms and conditions contained in the agreement, they were to refund to the defendants any balance from the advance so paid and to pay damages, if any (clause 7).

There was some dispute as to when work under the contract commenced, but Chan Meng Kwan (P.W.1), a director of the plaintiff firm, testified that he sent his machines and workmen to the defendants' land on 7th or 8th May, 1963, that his firm received the deposit of $2,000 under the agreement on 10th May, that one Phan Toong Sen (P.W.2) was employed by his firm to be in charge of the work, that they had to make roads for lorries to reach the land, and that work commenced some time on 26th or 27th May. The area marked off by the defendants to be excavated first was a piece of land about 2 to 3 acres in extent adjacent to the defendants' existing mine.

The defendants made the first progress payment of $1,500 on 11th June, 1963. The second progress payment of $1,600 was made on 16th July, 1963 by which date the plaintiffs had removed 10,655½ cubic yards of earth which had been excavated to a depth of 17 or 18 feet over a part of the area of 3 acres which was to be excavated first. This was the first phase of the work. It is to be observed that up to this stage the plaintiffs had nowhere dug to a depth of 25 feet, nor had the defendants at any time adhered to their undertaking for fortnightly progress payments, although the first progress payment was made in compliance with clause 4 providing for fortnightly payments. Before making the two progress payments the defendants did not complain about the earth not having been dug to a depth of 25 feet.

By the time of the second payment, the defendants had completely mined their adjacent lands and they urgently required the land which had been excavated under the first phase so as to continue their mining operations. The parties therefore went into account up to that date. The plaintiffs then owed the defendants a total sum of $2,227.75 to account of diesel oil, lubricating oil, messing of their labourers and miscellaneous charges. The amount due

from the defendants for the 10,655½ cubic yards of earth excavated and removed by the plaintiffs at 50 cents a cubic yard was $5,327.75. Deducting from $5,327.75 the amount of $2,227.75 owing by the plaintiffs and the progress payment of $1,500 the balance due to the plaintiffs was $1,600 which was the sum paid on 16th July, 1963. In making this payment the defendants did not limit themselves under clause 4 of the agreement to 70% of the actual work done.

The plaintiffs next moved to the second phase of their work but no progress payments were made in spite of demands for them. On or about 21st August, 1963 P.W.2 showed P.W.1 a voucher issued on behalf of and bearing the chop of the defendants and stated that no payment had been received on this voucher. Work was carried on until 9th September when P.W.2 told P.W.1 that he was told by Ho Tow Kee (D.W.5) on behalf of the defendant company to stop work. It was agreed that during the second phase the plaintiffs removed a total of 16,940 cubic yards of earth and that the average depth of the earth dug was only 7 feet.

It was common ground that work stopped in early September but there was serious dispute as to the reason for such stoppage. The plaintiffs' story was that they were told to stop work on 9th September, 1963 by the defendants' manager. This was denied by the defendants. According to the plaintiffs, the order to stop work was conveyed to P.W.2 by Ho Tow Kee (D.W.5), the assistant manager of the defendant company, and confirmed by Oh Kay Lai (D.W.4), the managing director of the defendant company. P.W.2 said that the order to stop work was given in the presence of two fellow workers named Phan Kong Yin (P.W.3) and Lai Chan. P.W.3 corroborated the evidence of P.W.2 on this point but Lai Chan was not called as a witness because it was stated that his whereabouts were then unknown. P.W.1 testified that the order to stop was conveyed to him by P.W.2. D.W.4 denied that he gave his kepala Ah Kee instructions to tell the plaintiffs to stop work. Ho Tow Kee (D.W.5) said that D.W.4 did not tell him to get the plaintiffs to stop work, that he himself did not tell them to stop work, and that the plaintiffs stopped working by themselves towards the end of September, 1963.

It was submitted by counsel for the defendants that as Phan Kong Yin's name was not mentioned in the plaintiffs' letter dated 13th September, 1963 (P.3) he was the sort of casual witness whom it would be very dangerous to believe. With regard to that submission, the learned trial judge had this to say:—

> "On the other hand, there was nothing improbable in his evidence and the mere fact that he was not mentioned in the letter did not necessarily mean that he was not present. Having regard to the fact that this letter was a first instruction when it was not usual to descend to details, I do not consider that the omission is on the same footing as an admission of facts that no one else was present."

It was also urged upon the learned trial judge that the omission of any reference to the order to stop work in the plaintiffs' then solicitors' second letter of 3rd October, 1963 (P.5) amounted to proof that no such order was given. As regards this submission, the learned trial judge stated his views as follows:—

> "Any reference would clearly be a mere repetition and would have been pointless in view of the denial in the defendants' reply (Exh. P.4). What the plaintiffs were concerned with was to put the defendants to the proof of their contention that the agreement still subsisted by demanding for progress payment. It is of relevance to note that at no time had the defendants' solicitors made any specific reference in the correspondence to their demand that the earth should be dug to the agreed depth before their obligation to pay arose. They contended themselves by making references to the terms of the agreement. On the other hand, the defendants had in the meantime issued a payment voucher for $1,800 in purported payment of the work or part of the work done in the second phase, but it transpired they never had the intention of honouring the voucher."

Having dealt with the evidence as to the reasons for the stoppage of work, the learned trial judge stated his conclusions as follows:—

> "In my view, to draw any inferences from the correspondence such as counsel for the defendants urged me to draw would be completely unjustified. Paying due regard to the demeanour of the witnesses for both sides, and in the context of the proved circumstances of the case and on the evidence, I come to a finding of fact that the defendants had instructed the plaintiffs to stop work."

Counsel for the appellants argued before us at great length on the learned trial judge's findings of fact on the question of stoppage of work. We were, however, satisfied that the learned trial judge's findings were unassailable. He had the opportunity to see and hear the witnesses and the conclusions at which he arrived were conclusions from a conflict of oral testimony. In the circumstances we felt that we would not be justified in interfering with his findings.

The main point taken by the defendants in denying the plaintiffs' claim in the court below was that on a true construction of clause 4 of the agreement, when read in conjunction with the recitals and clause 3, the plaintiffs were not entitled to any payment until and unless they had excavated the earth to a depth of 25 feet. That was also their major ground of appeal. The learned trial judge gave this point his fullest consideration and the conclusion at which he arrived is stated in the following passage in his judgment:—

"Read in its context, I therefore am of opinion that the 'earth so removed' in clause 4 referred to earth excavated from the land and removed to the dumping ground provided by the defendants as in clause 3 and further that the plaintiffs' right to the fortnightly progress payments for work done in digging and removing the earth is not dependant on their digging down to the agreed depth of 25 feet."

In our judgment, the learned trial judge's conclusion on this point was perfectly correct. To place any other construction on the words "earth so removed" in clause 4 of the agreement would be to make complete nonsense of the provision in the agreement regarding fortnightly payments. The words "earth so removed" quite clearly related to such earth as was excavated from time to time in the course of the excavation operations, and it was in respect of the earth so removed from day to day that progress payments had to be made fortnightly. It is to be observed that the contract was not a lump sum payment contract. It is also to be observed that the first progress payment was, in fact, made at the end of or not long after the first fortnight from the date of commencement of the excavation work. In our judgment, therefore, there was no merit in this major ground of appeal either.

On the question of the alleged repudiation of the contract by the appellants the learned trial judge had this to say:—

"My finding of fact does not seem however very material to the decision. It is abundantly clear that the defendants had at all times been in breach of their obligation to make periodic payments and in my view the plaintiffs would have been completely justified, if they were not in fact told to stop work, in treating the defendants' breach as repudiation of the agreement on the part of the defendants and in suing for payment on the basis of *quantum meruit*."

It was argued before us by counsel for the appellants that the non-payment by them of the sum of $1,800 did not, *ipso facto*, amount, in law, to repudiation of the contract and did not, in law, entitle the respondents to rescind the contract and to sue to recover a sum of money in respect of work done. In support of this argument he cited a number of authorities, the first three of which relate to contracts for the sale of goods. In *Simpson* v. *Crippin* [1] the goods were to be delivered in monthly quantities. It was held that the breach by the plaintiffs in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. In *Freeth* v. *Burr* [2] there was to be a delivery of goods in parcels at different times. It was held that the mere refusal to pay for the first parcel did not, under the circumstances, warrant the defendant in treating the contract as abandoned and refusing to deliver the remainder, and that the plaintiffs were entitled to damages for the breach. Lord Coleridge C.J. said (at page 213):—

". . . . it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, *viz.* that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free."

Keating J. said this (at page 214):—

"It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. Non-payment is an element."

In *Mersey Steel & Iron Co. Ltd.* v. *Naylor, Benzon & Co.* [3] the goods were to be delivered by instalments. Affirming the decision of the Court of Appeal, the House of Lords held that, upon a true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery, and that the respondents had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the company from further performance. The Earl of Selborne L.C. said (at page 438):—

"I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr*, [2] which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other, you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part;"

Lord Blackburn said (at page 443):—

"The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'"

In the much later case of *Spettabile* v. *Northumberland Shipbuilding Co., Ltd.*, [4] Atkin L.J., after he had cited definitions of repudiation, added:—

"They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract."

The other cases cited to us were the cases of *James Shaffer Ltd.* v. *Findlay Durham &*

*Brodie* [5] and *Sweet and Maxwell Ltd.* v. *Universal News Services Ltd.*,[6] which do not carry the matter any further.

In the present case, as was stated by the learned trial judge, the appellants were in breach of their obligation to make fortnightly payments. Their deliberate refusal to pay what was already due by way of fortnightly payments was an important element on the question of their repudiation of the contract. Furthermore, they ordered the respondents to stop work. This stoppage of work by them clearly went to the root of the contract. In the circumstances, the respondents had no option but to treat the contract as at an end and to sue for payment for the work which they had already done. In our judgment they were entitled to recover the amount claimed either on the basis of work done by them at the appellants' request or by way of damages on the basis of *quantum meruit*.

We could also find no reason to quarrel with the finding of the learned trial judge on the appellants' counterclaim when he said:—

"There is in all probability a sum due to the defendants in respect of fuel-oil, lubricants, messing and other necessary charges incurred by the plaintiffs in respect of the second phase. The defendants have failed to prove this amount though they have claimed for it in their counterclaim. They must be left to make their claim, if they are so advised, in another action. As for damages, they have failed to prove any, but in view of my finding that it was the defendants who were in breach, their failure is hardly material."

For the reasons I have stated, we dismissed the appeal with costs.

*Appeal dismissed.*

Solicitors: *Dharmananda & Co.*; *S.N. Leow.*

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## PUBLIC PROSECUTOR v. SIVASUPRAMANIAM

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian and Ali F.JJ.) June 20, 1969]

[K.L.—Federal Court Criminal Reference No. X.1 of 1969]

*Local authority — Commencing building operations without prior authority — Whether landowner only person liable — Municipal Ordinance (S.S. Cap. 133), s. 144(7), (10)(a), (11) and (12).*

The question reserved for the decision of the Federal Court in this reference was: "Whether the owner of land, upon which there is erected an unauthorised building, is the only person who can be charged with an offence under the provisions of section 144(7) of the Municipal Ordinance (Cap. 133)".

This reference arose out of the decision of the High Court allowing the appeal from the decision of the learned magistrate convicting the respondent of an offence punishable under section 144(10)(a) of the Municipal Ordinance ([1968] 1 M.L.J. 80).

**Held,** answering the question in the negative: Section 144(12) of the Municipal Ordinance was merely intended to impose liability on an ascertainable person where the actual culprit is unknown or cannot be traced. There is nothing in this subsection which exonerates the actual offender when this is known and no insuperable obstacles prevent the prosecution from proving his guilt; it is not available as a defence to any third party, not the landowner, who in fact is guilty of carrying out unauthorised building operations.

*Lim Beng Teck* v. *R.*[1] dissented from. Decision of the court below ([1968] 1 M.L.J. 80) reversed.

*Cases referred to:—*

(1) *Lim Beng Teck* v. *R.* [1957] M.L.J. 21.

(2) *Darus bin Ahmad* v. *Public Prosecutor* [1965] 1 M.L.J. 200.

(3) *Public Prosecutor* v. *Phang Swee Lan* [1960] M.L.J 6.

(4) *Public Prosecutor* v. *Phang Swee Lan* [1960] M.L.J. 147, C.A.

(5) *Syed Ahmad Aljuned* v *R.* (1962), 3 M.C. 312.

(6) *Attorney-General* v. *Beauchamp* [1920] 1 K.B. 650.

The following cases were also cited in argument: *Canada Sugar Refining* v. *R.* [1898] A.C. 735; *Eastbourne Corporation* v. *Fortes Icecream Parlour (1955), Ltd.* [1959] 2 Q.B. 92; *Associated Newspapers* v. *Registrar Restrictive Trading Agreement* [1964] 1 All E.R. 55; *The Queen* v. *Allen* (1872), L.R. 1 C.C.R 367; *Hill* v. *East and West India Dock Co.* (1883-84), 9 App. Cas. 448; *Ex parte Walton* (1881), 17 Ch. D. 746; *Inland Revenue Commissioner* v. *Hinchey* [1960] A.C. 748.

FEDERAL COURT.

*Robert K.C. Hoh* (*Abdul Hamid bin Tan Sri Azmi* with him) for the appellant.

*Ranjit Singh* for the respondent.

*Cur. Adv. Vult.*

**Ong Hock Thye C.J. (Malaya):** The question of law reserved for the decision of this court, on the application of the Public Prosecutor, under section 66 of the Courts of Judicature Act 1964 is:—

"Whether the owner of land, upon which there is erected an unauthorised building, is the only person who can be charged with an offence under the provisions of section 144(7) of the Municipal Ordinance (Cap. 133)"

It arises out of the decision of Gill J. (as he then was) allowing an appeal from the decision of the magistrate at Kuala Lumpur, convicting the respondent of an offence punishable under sub-section (10)(a) of section 144 of the said Ordinance.

The facts of this case were never in dispute. At all material times Madam Yoong Lee was the owner of the land comprised in Lot 3806 in the Mukim of Setapak. In November 1964 she saw Sivasupramaniam, the respondent, erecting a timber frame building measuring 10′ x 16′ on her land and reported the matter to the Municipality. It was the extension to